

SENATE RECORD VOTE ANALYSIS

105th Congress
1st Session

Vote No. 69

May 15, 1997, 2:01 pm
Page S-4537 Temp. Record

PARTIAL-BIRTH ABORTION BAN/Substitute (Feinstein/Boxer/Moseley-Braun)

SUBJECT: Partial-Birth Abortion Ban Act of 1997 . . . H.R. 1122. Feinstein/Boxer/Moseley-Braun substitute amendment No. 288.

ACTION: AMENDMENT REJECTED, 28-72

SYNOPSIS: As introduced, H.R. 1122, the Partial-Birth Abortion Ban Act of 1997, will enact criminal and civil penalties for any person who "partially vaginally delivers a living fetus before killing the fetus and completing the delivery." An exception will be provided if a partial-birth abortion is necessary to save the life of the mother and no other procedure will suffice. The language is identical to the language of H.R. 1833 from last Congress, which President Clinton vetoed (see 104th Congress, 1st session, vote Nos. 594-596 and 104th, 2nd session, vote No. 301).

The Feinstein/Boxer/Moseley-Braun substitute amendment would make it unlawful for any "physician knowingly to perform an abortion after the fetus has become viable" unless, "in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman." ("Viable" means the age at which an unborn baby can live outside of his or her mother, with or without medical assistance). No criminal penalties would be authorized; only the Justice Department would have authority to file civil charges. The Justice Department could only file charges if it gave at least 30 days advance notice of its intent to file and certified that it believed that filing charges was "in the public interest and necessary to secure substantial justice." For a first offense, a fine of up to \$100,000 could be imposed, and for a subsequent offense a fine of up to \$250,000 could be imposed. On a first offense, a case would be referred to a State medical licensing authority for the possible suspension of a medical license; for a second offense, a case would be referred to a State medical licensing authority for the possible revocation of a medical license. The Department of Health and Human Services would develop regulations to establish the procedures by which physicians would certify that the abortions they performed on fetuses that were so developed they could live outside of their mothers were necessary for life or health reasons for their mothers. The amendment would not apply in any State that had adopted any regulations on post-viability abortions, whether those regulations were more or less restrictive.

(See other side)

YEAS (28)		NAYS (72)		NOT VOTING (0)	
Republicans (2 or 4%)	Democrats (26 or 58%)	Republicans (53 or 96%)	Democrats (19 or 42%)	Republicans (0)	Democrats (0)
Chafee	Akaka	Abraham	Helms	Biden	
Jeffords	Baucus	Allard	Hutchinson	Breaux	
	Bingaman	Ashcroft	Hutchison	Bumpers	
	Boxer	Bennett	Inhofe	Byrd	
	Bryan	Bond	Kempthorne	Conrad	
	Cleland	Brownback	Kyl	Daschle	
	Durbin	Burns	Lott	Dodd	
	Feinstein	Campbell	Lugar	Dorgan	
	Glenn	Coats	Mack	Feingold	
	Inouye	Cochran	McCain	Ford	
	Kennedy	Collins	McConnell	Graham	
	Kerrey	Coverdell	Murkowski	Harkin	
	Kerry	Craig	Nickles	Hollings	
	Lautenberg	D'Amato	Roberts	Johnson	
	Leahy	DeWine	Roth	Kohl	
	Levin	Domenici	Santorum	Landrieu	
	Mikulski	Enzi	Sessions	Lieberman	
	Moseley-Braun	Faircloth	Shelby	Moynihan	
	Murray	Frist	Smith, Bob	Reid	
	Reed	Gorton	Smith, Gordon		
	Robb	Gramm	Snowe		
	Rockefeller	Grams	Specter		
	Sarbanes	Grassley	Stevens		
	Torricelli	Gregg	Thomas		
	Wellstone	Hagel	Thompson		
	Wyden	Hatch	Thurmond		
			Warner		

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

Those favoring the amendment contended:

Any legislation put forward by Congress that restricts access to abortions or to any particular medical procedure must be constitutional and must contain sufficient protections for a woman's health. The Feinstein/Boxer/Moseley-Braun amendment meets that test. This amendment is in full conformance with Supreme Court rulings that protect the constitutional right to choose. Women do not lightly carry children through most of a pregnancy and then casually decide to abort; when they do have abortions, it is due to heartwrenching, difficult conditions that make it absolutely necessary to protect their lives or their health. This decision needs to be left between a woman, her doctor, and her god.

Abortions should not be performed on viable fetuses unless necessary for compelling medical reasons. Under the Constitution, States have the right to protect potential human life once that life is capable of living outside the womb. Before that time, States, and by implication the Federal Government, do not have the right to interfere in this personal, private decision. A woman has a basic, fundamental right to control her own body. Once a fetus becomes viable, however, that basic right is balanced against the State's interest in preserving potential human life. The State is then allowed to place restrictions on abortion so long as those restrictions do not threaten women's lives or health. In a normal, healthy pregnancy, once a fetus reaches viability the right to an abortion can be limited.

The particular restrictions in this amendment are strong. If a doctor performs a late-term abortion without sufficient cause, he can be fined up to \$100,000 and have his license suspended. If he does it again, he can be fined up to \$250,000 and lose his license. The threat of these fines will make certain that no doctor will ever perform an unnecessary late-term abortion.

Unlike the underlying bill, the Feinstein amendment would actually reduce the number of abortions performed in the United States. The bill would only force doctors to use different procedures which some people might find equally unpleasant. Unlike the underlying bill, the Feinstein amendment would not place unconstitutional restrictions on pre-viability abortions (most so-called "partial-birth" abortions are done before viability; the proper medical term is "dilation and extraction" abortions). Unlike the underlying bill, it would not attempt to make any medical judgments as to which particular procedures should or should not be used. When women's bodies are at stake, the full range of medical treatments should always be available. Even if dilation and extraction abortions have risks for women, in some particular circumstances it is possible that they may be the safest option. For that reason, the American College of Obstetricians and Gynecologists does not think that they should be banned.

We do not expect this amendment to be agreed to because our colleagues are determined to pass an unconstitutional restriction on this one medical procedure. President Clinton will veto it, and we will sustain his veto. Even if this bill became law, though, the courts would quickly strike it down. In the final analysis, considering this bill is just a public relations exercise. We urge our colleagues to stop this game by voting in favor of the Feinstein amendment.

Those opposing the amendment contended:

The Feinstein amendment has not been offered to save the lives of babies; it has been offered to save the political lives of Senators whose radically pro-choice views shock and anger the voters in their States. The amendment would first strike every word of the ban on partial-birth abortions. It would then substitute a weak, meaningless ban on certain post-viability abortions, no matter how they were performed. Basically, the amendment would say that if an abortionist performed an abortion on an unborn baby that he said was old enough to survive outside the womb and that he said was totally unnecessary to protect the mother's life or health (even as broadly defined in this amendment), then the Department of Justice could seek civil damages. This amendment would not save a single unborn baby's life. It is a horrible charade intended to give political cover to those Senators who intend to vote against this bill.

The argument our colleagues have made in defense of their amendment is that it would stop all post-viability abortions that were not performed for life or health reasons, and that the partial-birth abortion ban will not stop any abortions. The truth, though, is that their amendment would not prevent a single abortion at any stage of pregnancy right up until birth, including partial-birth abortions. The bill, as they say, will not prevent any abortions, but that is not its intent--it is intended to stop one particularly horrible, cruel method of abortion that is arguably a form of infanticide rather than abortion. We are certainly interested in efforts to protect the lives of viable preborn babies, and of all preborn babies for that matter, but any such efforts should be in addition to rather than in place of the ban on partial-birth abortions.

Our colleagues' amendment, though, is anything but an effort to protect viable preborn babies. First, it would only apply in those States that did not have any regulations, however lenient, on late-term abortions. Second, it would leave it up to the abortionist to say if the baby were "viable." Viability is a subjective judgment; the youngest gestational age at which children have been able to survive outside of the womb, with medical assistance, is 21 weeks. However, our colleagues have said that viability is "between" 23 and 28 weeks, and some abortionists could argue that any age under 35 weeks is before viability because babies born before 35 weeks have lower survival rates. Under *Planned Parenthood of Central Missouri v. Danforth*, the Court said that the decision of viability rested solely with the attending physician, and varied based on the particular circumstances. Take, for instance, the case of

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Donna Joy Watts. She had exactly the same fetal abnormalities that were present in a couple of the cases our colleagues cited as justifications for partial-birth abortions. Four hospitals refused to deliver Donna Joy and recommended abortion; they knew that they could be sued for delivering a baby with medical problems but that they could not be sued for killing that same baby. Her parents finally managed to find a hospital that would deliver her, but after she was born the doctors refused to provide food, insisting that she was still a "fetus" and was not viable. Her parents came up with their own method of feeding her with an eyedropper, for an hour and a half at a time, with an hour and a half break in between feedings. They kept this schedule up for months, and Donna Joy survived. Though she is missing most of her brain, she is now 5 years old, can walk, can talk, and is a happy, growing child. Under the Feinstein amendment, all any abortionist would have to do is assert that the abortion he performed, in "his medical judgment," was not on a viable fetus. Third, even if he asserted that it was performed on a viable fetus, he could still escape prosecution by saying that he did it because the life or the health of the mother was at "risk." One prominent abortionist has already said that he will certify that every pregnancy poses a risk, and he will be right, because every pregnancy does pose some minimal risks. Further, though we do not like it, the controlling court cases on this subject make it very clear that "health" encompasses a very broad area. In *Doe v. Bolton*, which was issued along with the *Roe v. Wade* decision, the Supreme Court said that health reasons for abortion include "all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the well-being of the patient." Remember, the late Dr. McMahon, one of the two people who has publicly admitted to performing partial-birth abortions (many more have privately admitted to performing and teaching partial-birth abortions), said that he performed them for a variety of medical reasons, including that the mother was depressed, the mother was a minor, or the baby had a cleft lip. Under the Feinstein amendment, an abortionist could assert that there was a risk that a mother would become depressed because her unborn, viable baby had a cleft lip, and he could then perform a partial-birth or any other type of abortion with impunity. No one could challenge the abortionist's subjective judgment—he would have total authority under the amendment to decide if he were committing a legal or an illegal abortion. Would our colleagues suggest such an arrangement for any other type of law? For instance, would they say that gun dealers should be in charge of deciding whether or not the guns they are selling are assault weapons?

Most partial-birth abortions occur at the end of the second trimester, in the few weeks immediately preceding the generally acknowledged point of viability. The Feinstein amendment's nonrestrictions would not even pretend to apply to those abortions. Our colleagues are unwilling to admit that even the slightest regard should be shown for those babies because they cannot survive outside of the womb. We strongly disagree. Perhaps under current court rulings women are allowed to abort such babies for any reason they wish, but that does not mean they have the right to abort them using the cruelest means imaginable. For that matter, there is no constitutional case stating that the right to end a pregnancy is the same as the right to end an unborn baby's life. The right to an abortion is not the same as the right to a dead baby. According to the more than 500 doctors of the Physician's Ad-hoc Coalition for Truth (PHACT): "It is never medically necessary, in order to protect a woman's life, health, or future fertility, to deliberately kill an unborn child in the second or third trimester of pregnancy, and certainly not by mostly delivering the child before putting him or her to death. While it may become necessary, in the second or third trimester, to terminate a pregnancy because of maternal illness, abortion is never required. What is required is separation of the child from the mother, not the death of the child."

In the future, we will gladly support efforts to provide meaningful restrictions on late-term abortions. We imagine that if any such restrictions are proposed the supporters of the Feinstein amendment will be the first to oppose them. All they want is a vote to claim that they are against most late-term abortions, because they are afraid of the political consequences if the voters come to fully appreciate how radically pro-choice they really are. We hope that their efforts will fail; we hope that people will see through this charade. We urge the rejection of the Feinstein amendment.